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NO. 83-399

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

PAUL LOVEDAY, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Paul L. Loveday
55 Francisco, 7th Floor
San Francisco, CA 94133
(415) 955-0733
Attorney for Petitioners

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Instead of demonstrating that review by this Court is unwarranted, the Solicitor General's Opposition Brief[1] underscores the critical need for judicial review in this case.

[1] All references to the Solicitor General's Opposition Brief will consist of the appropriate page number or numbers, preceded by the letters "Opp.".

I. FIRST QUESTION PRESENTED BY PETITIONERS

Petitioners argued in their Petition for a Writ of Certiorari that, pursuant to Section 317(a)(1) of the Communications Act and the Commission's Regulations, the undisputed fact of 100% funding by the tobacco industry of No on 10 ads is sufficient by itself to require identification of the tobacco companies as the sponsor of those advertisements.[2] Rather than attempt to identify any defect in Petitioners' legal analysis, the Solicitor General incorrectly alleged that Petitioners had not made this argument to the Federal Communications Commission, argued that Petitioners were

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[2] The Solicitor General's Brief greviously mistates (Opp. 7) Petitioners' argument. Petitioners do not make the absurd argument that "when a political committee buys advertising time with funds contributed by others, the true sponsors are the contributors and not those who decided to purchase the broadcast time and exercised editorial control over the ads." Petitioners' argument is that Congress, in drafting Section 317(a)(1), and the Commission, in drafting 73.1212(a) and (e), assumed that if four companies in one industry contribute 100% of the cost of a political advertising campaign in proportion to their respective shares of the U.S. market, those companies control that advertising and no further demonstration of editorial control is necessary.

therefore foreclosed by 47 U.S.C. 405[3] and the doctrine of exhaustion of administrative remedies from raising this argument for the "first time" on judicial review, and contended that "the court of appeals properly declined to review this issue." (Opp. 7-8)

A. Rather Than "Decline To Review This Issue," The Court Of Appeals Ignored This Issue.

Petitioners raised the 100% funding issue before the Court of Appeals. Like the Solicitor General, the Commission made no attempt to contest the merits of Petitioners' argument in the Commission's Opposition Brief before the Court of Appeals, but merely argued that 47

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[3] 49 U.S.C. 405 provides in pertinent part:

> The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order. . . except where the party seeking such review . . . relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass.

U.S.C. 405 precluded Petitioners from raising the issue. Petitioners, in their Reply Brief before the Court of Appeals, demonstrated that they had indeed raised the issue before the Commission and demonstrated that, as a matter of law, the Court of Appeals should review the issue even if the issue had not been raised before the Commission.

The Court of Appeals did not "decline" to review the issue. Its 34 page opinion contained no reference to 49 U.S.C. 405 or the doctrine of exhaustion of administration remedies, no finding that Petitioners did not raise the issue before the Commission, and no discussion of Petitioners' legal argument that the Court of Appeals should review the issue even if it had not been raised before the Commission. The Court of Appeals merely ignored the 100% funding issue.

B. Petitioners Raised The 100% Funding Issue Before The Stations, Before The Commission's Broadcast Bureau, And Before The Full Commission.

The 100% funding issue was raised before the Commission.

Petitioners' September 26, 1980 letter to all California broadcast stations (attached as App. D, pp. 78a-83a to the Petition for a Writ of Certiorari) argued that the mere fact the money used by No on 10 to purchase No on 10 messages came virtually exclusively from the tobacco industry resulted in the stations' obligations to identify the tobacco industry as sponsor of those ads. Petitioners' October 3, 1980 letter to the stations (App. D, pp. 85a-90a) set forth additional facts with respect to the tobacco industry's motives and methodology for disguising its funding of the No on 10 campaign, but argued that such virtual 100% funding was the basis of the stations' obligations to identify the tobacco industry as sponsor.

Petitioners argued in their October 16, 1980 Request for Declaratory Ruling to the Commission that there were two independent reasons why the tobacco industry must be identified as sponsor of No on 10 ads:

> The Tobacco Industry has caused its agent and alter ego, deceptively named Californians Against Regulatory Excess, (hereinafter sometimes called "Excess"), to purchase massive amounts of air time from California radio and television stations for advertisements urging a "no" vote on Proposition 10. Virtually one hundred percent of such air time has been paid for by moneys transferred to Excess from the four largest cigarette manufacturers, each contributing according to its share of the tobacco sales market. All four cigarette manufacturers are located outside of California. Because these four largest cigarette manufacturers (representing almost 90% of total cigarette sales) are acting in concert and contributing according to their market shares, the campaign to defeat Proposition 10 is being financed by the Tobacco Industry operating in unison through its agent and alter ego Excess.
>
> The Tobacco Industry exercises editorial control over No on 10 advertising. (J.A. 20) (Emphasis in original)

If the Commission did not understand that Petitioners were arguing that the mere fact

that 100% of the cost of No on 10 advertising was paid for by the tobacco industry was sufficient by itself to require identification of the tobacco industry as sponsor, the tobacco industry's attorneys understood the argument and attempted to rebut the argument in their Opposition Brief to the Commission, thereby clearly putting the question at issue:

> Californians Against Regulatory Excess does not deny that the funding that has been received so far come (sic) from tobacco companies and has issued two releases on these facts. (Californians Against Regulatory Excess) does not believe that the source of contributions alone dictates the identification requirement. (J.A. 144)

The tobacco industry attorneys cited V.O.T.E.R., 46 RR2d (P&F) 350 (1979) as authority for its position on the 100% funding issue:

> Less than a year ago, the Commission had occasion to consider by way of a complaint the precise issue raised here.

> In, V.O.T.E.R., supra, the complaint alleged that a group named "Westchester Citizens Against Government Takeover," ("Citizens"), (a committee organized to oppose a county ballot proposition that proposed that the government purchase the privately-owned public utility company, Consolidated Edison Company of New York) was not in fact the true sponsor. The facts in that case were on all fours with this case: (a) Consolidated Edison contributed a substantial amount and percentage of the total contributions to Citizens; (b) the complaint alleged that Citizens was an agent of Consolidated Edison, by virtue of these contributions; and (c) Citizens responded that it was a bona fide group and had paid for and controlled the content of its advertisements. (J.A. 142) (Emphasis added)

Petitioners again raised the 100% funding issue in their Application for Review of the Broadcast Bureau's decision to the full Commission by pointing out that the Broadcast Bureau had erred with respect to the meaning of the word "sponsor". (J.A. 177)

C. Even If Petitioners Had Not Raised The 100% Funding Issue Before The Commission, The Court of Appeals Was Nevertheless Required To Review The Issue.

1. Petitioners are not required to raise an issue before the Commission where the Commission has already made known its views to the contrary.

Even if the Petitioners had not presented the 100% funding issue to the Commission, the issue would still be ripe for judicial review since the Commission had already made known its views contrary to Petitioners' position. See Action for Children's Television v. FCC, 564 F.2d 458, 469 (D.C. Cir. 1977).[4] The Commission had already held in V.O.T.E.R, supra, that the mere showing that the opponent of a ballot proposition in New York had received all or a substantial part of its

[4] In Action for Children's Television v. FCC, the complainants admitted they had not raised before the Commission an issue on which they sought judicial review. The D.C. Circuit held, however, that the complainants were not foreclosed by 49 U.S.C. 405 from raising the issue before it because of the "concrete indication" that raising the issue before the Commission would have been futile. That "concrete indication" was the fact that the Commission had already made known its views to the contrary on the issue in another proceeding.

funding from Consolidated Edision Company was insufficient to require stations to identify Consolidated Edison as the sponsor of television and radio ads opposing the proposition. Therefore, it would have been (and indeed was) futile for Petitioners to raise the 100% funding issue before the Commission. Petitioners are not foreclosed from judicial review for failure to raise an issue before the Commission if that effort would have been futile. Way of Life Television Network, Inc. v. FCC, 593 F.2d 1356, 1360 (D.C. Cir. 1979).

2. 49 U.S.C. 405 commands only that the Commission be afforded the opportunity to pass on issues. There is no requirement that this opportunity be afforded in any particular manner or by any particular party.

The D.C. Circuit's analysis of 49 U.S.C. 405 in Office of Communication of United Church of Christ v. FCC, 465 F.2d 519 (1972) demonstrates that it was improper for the same court to ignore the 100% funding issue in the instant case. In Office of Communications of United Church of Christ the Commission argued that none of the arguments raised in the Church's

brief to the D.C. Circuit had been raised before it and that the Church was therefore foreclosed from making those arguments by Section 405 of the Communications Act. The D.C. Circuit responded that:

> On its face, Section 405 commands only that the Commission be afforded the opportunity to pass on issues. There is no requirement that this opportunity be afforded in any particular manner, or by any particular party. 465 F.2d at 523.

Since the issue raised by the Church on appeal was discussed by the Commission minority in its dissent, the D.C. Circuit held that the purposes of the statute had been fulfilled.

In the instant case, even if the 100% funding issue was not raised before the Commission by the Petitioners, it was clearly raised before the Commission by the tobacco industry attorneys' in their Opposition Brief before the Commission and by the parties in V.O.T.E.R. The Commission had been afforded an opportunity to pass on the 100% funding issue. The purposes of Section 405 have been ful-

filled. See also Buckeye Cablevision, Inc. v. U.S., 438 F.2d 948, 951 (D.C. Cir. 1971)

3. Section 405 is not to be interpreted mechanically.

Section 405 is not inflexible and is not to be interpreted mechanically.[5] In Joseph v. FCC, 404 F.2d 207 (1968) the D.C. Circuit permitted arguments to be raised before it that were not raised before the Commission, stating:

> The question whether there has been adequate compliance with the prescribed prerequisites to judicial review cannot be answered mechancially. It involves consideration of the purpose of requirement, the type of issue, and the nature of the party. 401 F.2d at 210.

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[5] The nonstatutory doctrine of exhaustion of administrative remedies is also not to be interpreted mechancially. This Court has observed that "the doctrine is applied in a number of different situations and is, like most judicial doctrines, subject to numerous exceptions. Application of the doctrine to specific cases requires an understanding of its purposes and the particular administrative scheme involved." McKart v. United States, 395 U.S. 185, at 193. This is illustrated by comparing the case cited by the Solicitor General (Opp. 7), United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952), with a case with an almost identical factual situation but with a different result -- Wong Wang Sung v. McGrath, 339 U.S. 33.

The nature of the party is significant in this case. Exactly as in Joseph v. FCC, Petitioners in the instant case "do not have the same sort of Washington representation to uncover threats to their interest, or deploy apparatus to combat them, as do parties whose interest is economic". Joseph v. FCC, 401 F.2d at 210. As stated in Loveday's Declaration attached as Exhibit A to Petitioners' Reply Brief before the Court of Appeals, Petitioners did not have adequate financial resources to retain an attorney. Consequently, Petitioner Loveday represented them pro bono and pro se. Loveday is a business lawyer who does not handle litigation. At the time this matter was before the Commission he had never before handled a matter before an administrative agency or an appellate court. He believed his Application for Review exhaused all administrative remedies. He was never asked by the Commission to elaborate on his identification of the Broadcast Bureau's errors.

The type of issue is significant. Petitioners argument that the Commission's own regulations state that the "sponsor" of an advertisement is the party which "pays for" the advertisement. Once put on notice by the Application for Review that it had erred with respect to the meaning of the word "sponsor", it was reasonable to assume that the Commission could find the definition of the word in its own regulations.[6]

The purpose of Section 405 was fulfilled in that the Commission was afforded an opportunity to pass on the issue. This case is unlike Allianza Federal de Mercedes v. FCC, 539 F.2d 732 (D.C. Cir 1976). In that case, Allianza Federal argued to the Commission that an Albuquerque station's license should not be

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[6] Moreover, Bilateral Bicultural Coalition v. FCC, 492 F.2d 656 (D.C. Cir. 1974) and its successor Bilateral Bicultural Coalition v. FCC, 595 F.2d 621, 193 U.S. App. D.C. 236 (D.C. Cir. 1978) (en banc) require the Commission to make its own inquiry in matters such as this case where Petitioners have limited resources and have few procedural tools available. Such a duty to make its own inquiry includes the duty to perform some legal analysis.

renewed for two very specific and limited factual reasons-- namely because the Albuquerque licensee allegedly failed to present programs (i) on discrimination against Mexican-Americans and (ii) on the question of whether Mexican-Americans were illegally deprived of Spanish land grants. On appeal to the D.C. Circuit, Allianza Federal made an entirely new factual allegation not made before the Commission-- namely, that the station allocated only a minuscule amount of its public interest programming to serving the needs of Albuquerque's 40% Mexican-American population and, therefore, its programming was prima facie inconsistent with the public interest. The instant case is substantially different. No new factual allegations were presented by Petitioners in the instant case to the Court of Appeals which were not presented to the Commission.[7]

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[7] This Court has indicated that the doctrine of exhaustion of administrative remedies may be inapplicable if all facts have been put before an administrative agency and only a legal argument with respect to statutory interpretation has not been raised before that agency. McKart v. United States, 395 U.S. at 198 (1969).

D. No Defect In Petitioners' Position On The 100% Funding Issue Has Been Identified.

The 100% funding issue should be reviewed by this Court because (i) the issue has not yet been judicially reviewed; (ii) because the issue has received no analysis from the Commission, and (iii) no defects in the merits of Petitioners' position have been identified by the tobacco industry attorneys, the Commission, the Court of Appeals or the Solicitor General.

The Commission's holding with respect to the 100% funding issue in V.O.T.E.R. was conclusionary and made without analysis. No reasons were given by the Commission for its arbitrary holding.

The tobacco industry attorneys in the instant case gave no reasons -- other than their reliance on V.O.T.E.R. -- for their position on the 100% funding issue. The Commission's decision in the instant case arbitrarily relied on V.O.T.E.R. During judicial review, neither the Commission nor the Solicitor General addressed the merits of the

issue. The Court of Appeals did not address the issue at all.

Given the fundamental importance of this issue in countless ballot proposition campaigns throughout the country, this Court should not allow the issue to be dismissed without judicial review.

II. THE SECOND QUESTION PRESENTED BY PETITIONERS

The Solicitor General does not deny and apparently concedes (at Opp. 9) that the 1960 amendment of Section 317 incorporated the Commission's decisions in Albuquerque Broadcasting Co., 40 FCC 1 (1946) and the so-called NAM Opinions.

Even if it were true, the Solicitor General's overstatement (Opp. 9 n. 9) that Albuquerque Broadcasting did not identify the extent of stations' duty of investigation would be irrelevant to the instant case since the 144 stations made no investigation at all, and since Albuquerque Broadcasting required an "independent" and "arduous" investigation by stations and required that stations take "all reasonable measures" to discover the "source" of funds used by the apparent sponsor.

The Solicitor General erroneously asserts (Opp. 9, n. 9) that the NAM Opinions did not involve a situation in which stations had facially plausible information supporting a conclusion that the apparent source of certain broadcasts, station WTTG, was the real source. The script accompanying the broadcast materials stated only that the materials were produced by WTTG. The stations did indeed have information in their files which, had they fulfilled their reasonable diligence obligations, would have led to the conclusion that WTTG was not the true sponsor. The stations in the instant case, however, had much more persuasive information (in the form of letters from Petitioners) that Californians Against Regulatory Excess was not the true sponsor.

The crucial aspect of the NAM Opinions, however, is the holding that, with respect to broadcast material on controversial or political issues, the "highest degree of diligence" is required by the station to "ascertain" the actual source. 40 FCC at 14.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL L. LOVEDAY
November 29, 1983